Supreme Court, U.S.
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No. 95-807

In The

Supreme Court of the United States

October Term, 1995

ROBERT JONES,

Petitioner,

v.

BALTIMORE CITY POLICE DEPARTMENT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review a case which was not decided on the basis of federal law and which presents no material issues of federal law for this Court to consider?

2. Should a police officer, who was properly suspended without pay and who was later found guilty in criminal court of felonies relating to child pornography, be awarded back pay and benefits from the date of a subsequent procedurally improper termination?

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BRIEF IN OPPOSITION

The Respondents, the Baltimore City Police Department and Edward V. Woods, Police Commissioner, urge that the Petition for Writ of Certiorari to review the judgment of the Court of Special Appeals of Maryland be denied for the reasons set forth below.

STATEMENT OF THE CASE

In January, 1990, Baltimore police officer Robert Jones, the Petitioner, was charged with two felonies relating to child pornography. He was arrested on January 18, 1990. The next day, a hearing was held by Colonel Patricia A. Mullen, Chief of the Community Services Division. In attendance were Lt. Arthur Smith and Sgt. Mark Holback, both of the Personnel Division, Sgt. Robert Matuszak of the Internal Investigation Division ("IID"), Officer Jones and his attorney, Terry Lavenstein, and a secretary. The hearing lasted about half an hour.

Sgt. Matuszak presented the facts as gathered by IID:

> On February 17, 1989, Officer Jones had mailed a video tape depicting child pornography to an address set up by an undercover sting operation being conducted by the Philadelphia police and U.S. Postal Inspectors. As a result, the U.S. Postal Inspectors obtained a search warrant, which was executed on March 8, 1989 at Jones' residence. Members of the Baltimore Police Department and Maryland State Police assisted. Video tapes, recording equipment and correspondence were seized. The next day, Officer Jones was reassigned to the Communications

> Division and his police powers were suspended. He immediately went on medical leave, citing stress-related problems.
>
> The Carroll County State's Attorney's Office reviewed the evidence and charged Jones with two felony counts of child pornography under Maryland law. An arrest warrant was issued.
>
> On January 18, 1990, Officer Jones surrendered himself at the State Police Westminster Barracks. After the arrest, Jones was suspended from duty by Sgt. Holback of Personnel.

Mr. Jones' attorney, Terry Lavenstein, spoke on behalf of Jones at the suspension hearing. He questioned the appropriateness of the Carroll County charges. Moreover, he argued that Jones should be returned to duty with pay and be continued on his stress-related medical leave.

The ruling delivered after the hearing was that Jones should remain suspended from duty without pay and that his police powers should remain suspended. Jones was given written permission to seek outside employment during his suspension. On January 22, 1990, Personnel Order 62-90 was issued, suspending Jones without pay, effective January 18, 1990, in accordance with the suspension hearing of January 19, 1990.

On September 7, 1990, the Circuit Court for Carroll County found Jones guilty of the two felony charges; sentencing was scheduled for December 18, 1990. On October 5, 1990, the Police Department terminated Jones without a hearing, based on its belief that he had been convicted. On the day of sentencing, Jones received probation before judgment. The Department, however, did not rescind Jones' termination because of its position that

he had been convicted of the felonies. This position was ultimately rejected by the Court of Appeals of Maryland. After that Court's decision in *Jones v. Baltimore City Police Dept.*, 326 Md. 480 (1992), "Jones' current legal status continue[d] to be suspension without pay. . . . " *Id.* at 490.

A Departmental Trial Board held hearings on December 16, 1992, and March 23, 1993 in order to determine what disciplinary action was appropriate. As a result, Jones was found guilty of having violated the laws against child pornography and of having brought discredit upon himself and the Department. The trial board recommended Jones' termination and the Commissioner agreed. Jones was fired on April 19, 1993.

On September 2, 1993, Jones filed an Amended Petition to Show Cause and for a Writ of Mandamus, seeking back pay and damages for defamation. Eventually, the parties filed cross motions for summary judgment which were heard by the Honorable Ellen M. Heller, Circuit Court for Baltimore City, on February 7, 1994. Judge Heller granted partial summary judgment in favor of Jones on the back pay claim, but did not completely resolve the defamation claim.

On March 23, 1994, the Respondents filed a motion for summary judgment on the remaining parts of the defamation claim. A hearing was held before the Honorable Hilary D. Caplan, who granted summary judgment in favor of the Respondents on March 29, 1994. Judge Caplan's ruling finally resolved the remaining issues in the case.

On April 27, 1994, the Respondents appealed from the back pay aspect of the case and on May 5, 1994, Jones

filed a cross appeal from the rulings on his defamation claim. In an unpublished opinion filed on February 15, 1995, the Court of Special Appeals of Maryland reversed as to the back pay claim and affirmed as to the defamation claim.

Jones filed a petition for writ of certiorari seeking review by the Court of Appeals of Maryland. On August 21, 1995, that Court denied Jones' petition.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari, because further review is neither desirable nor in the public interest. The decision below was unreported and will have no effect as precedent.

The decision of the lower court did not rely on federal law and was not interwoven with federal law. Instead, the lower court looked to the Amended Petition to determine what issues were material to the motions for summary judgment. Because the decision was based on clear and adequate state law, this Court should not review the decision.

This case presents no important questions of federal law. The suspension of Jones was accomplished properly, but the propriety of the suspension was not before the trial court. Similarly, no federal issue as to improper termination or back pay is before the Court, because there was no allegation of wrongdoing with respect to Jones' suspension.

ARGUMENT

THE COURT SHOULD DENY THE PETITION BECAUSE THE DECISION BELOW DID NOT REST ON FEDERAL LAW AND BECAUSE THE ISSUES WHICH THE PETITIONER SEEKS TO RAISE WERE NOT PROPERLY BEFORE THE LOWER COURTS.

This Court should deny the petition for writ of certiorari, because further review is neither desirable nor in the public interest. The decision of the Court of Special Appeals of Maryland was unreported and, therefore, will have no effect as precedent in any other case. The Court of Appeals of Maryland did not consider it worthy of further review. Moreover, the Court of Special Appeals did not decide a question of federal law in arriving at its decision. Therefore, this case fails to meet any of the criteria for discretionary review by this Court, as set forth in Rule 10.1.

A. This Court should not review the decision below because it did not rest on federal law.

This Court should deny the writ, because the decision of the Court of Special Appeals did not rest on federal law and did not decide a federal question. In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court stated that when a state court decision is clearly based on state law that is both adequate and independent, this Court will not review the decision. *Id.* at 1041. However, when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," this Court requires that it contain a " 'plain statement' that [it] rests upon adequate and independent grounds."

Id. at 1040, 1042; *see also Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990).

The decision in the instant case did not rest primarily on federal law and was not interwoven with federal law. The Court of Special Appeals instead examined the Amended Petition to determine exactly what the Petitioner had alleged. Paragraphs 11 and 12 of the Amended Petition stated:

> 11. By refusing to rescind its termination order and immediately reinstate Robert Jones upon the striking of his guilty verdict, and pay him all salary and benefits due him *since the granting of his [probation before judgment]*, the Baltimore City Police Department has violated Robert Jones' right under the LEOBR [Law Enforcement Officer's Bill of Rights] and the 14th Amendment to the Constitution of the United States.
>
> 12. By refusing to pay Robert Jones such back pay and benefits that were denied him during his suspension without pay, *a suspension which should have been rescinded by the removal of charges against Robert Jones*, the Baltimore City Police Department has violated Robert Jones' right under the LEOBR and the 14th Amendment to the Constitution of the United States.

App. 11. (Emphasis added.) The Court of Special Appeals found that the wrongful conduct alleged in Paragraph 11 was the failure to reinstate Jones after he was granted probation before judgment, thus depriving him of the salary and benefits he would have earned, had he been reinstated at that time. App. 12. That Court found that Paragraph 12 alleged essentially the same wrong: i.e., the failure to rescind the suspension when the charges

against Jones were removed by the grant of probation before judgment. App. 12.

The Court of Special Appeals looked to the Circuit Court's decision, which was based on a conclusion that Jones' original administrative hearing was inadequate under *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). However, under the appellate court's reading of the Amended Petition, that due process issue had not been alleged and was not properly before the trial court. Therefore, the summary judgment was based on an immaterial issue and the trial court erred as a matter of law. App. 15.

Thus, it is clear that the decision of the Court of Special Appeals did not rest on federal law or decide a question of federal law. Even the Petitioner agrees that "[i]n deciding against Jones, the Court of Special Appeals did not reach the merits on the issue of back pay. . . . " Petition for Writ of Certiorari at 19. The summary judgment was reversed because it violated state law in that a court may not grant summary judgment on an immaterial issue.

Because the decision below rested not on federal but rather on state grounds, this Court should deny the writ and decline further review. *Michigan v. Long, supra.*

B. The issues the Petitioner seeks to raise here were not properly before the lower courts.

The Petitioner attempts to portray this case as one involving the rights of improperly terminated employees. If the Court of Special Appeals had ever considered the

issue which it found immaterial in light of the pleadings, however, it would have been dealing with an altogether different issue.

As the facts show, the Petitioner was initially suspended without pay but with a proper suspension hearing. After being found guilty in criminal court of the child pornography felonies, he was terminated without a hearing. This termination was found to be improper by the Court of Appeals of Maryland in *Jones v. Baltimore City Police Dept., supra,* because termination without a hearing is only authorized by Maryland statute after an officer has been convicted of a felony. The Court there held that probation before judgment is not a "conviction"; therefore, the purported termination was not proper. The Court of Appeals noted, however, "that Jones' current legal status continues to be suspension without pay. . . . " *Id.* at 490. Accordingly, although the purported termination was invalid, Jones was still suspended as of January, 1990.

Because Jones had been found guilty, though not convicted, of child pornography, the Court of Special Appeals found that he was not entitled to be reinstated after the guilty finding and not entitled as a matter of law to back pay and benefits. The Court found it unreasonable to suggest that by virtue of the probation before judgment following the guilty verdict Jones was immediately entitled to be restored to the rank, pay and benefits of a police officer.

In his Petition, Jones attempts to raise the issue of whether the suspension hearing was sufficient. Md. Code, Art. 27, § 734A(3) authorizes suspension of a law

enforcement officer without pay if he has been charged with a felony. In the present case, Jones has argued below that the suspension hearing must allow the officer the opportunity to present evidence on whether he is guilty of the felony. The Respondents have argued below that the officer must receive notice of the charges against him, an explanation of the basis for the suspension and an opportunity to respond, as in *Cleveland Board of Educ. v. Loudermill, supra*. The basis for the suspension was not that Jones was guilty of the felonies, but rather that he had been charged with them; therefore, he deserved the opportunity to refute the allegation that he had been charged with felonies. The suspension hearing provided Jones with that opportunity. Accordingly, Jones' suspension without pay was properly effected and he has no claims for back pay or benefits.

This entire discussion is irrelevant, however, because the Amended Petition did not allege any wrongdoing with respect to the suspension hearing. Since this issue was not before the Maryland courts, it cannot properly come before this Court in this case. Similarly, there is no live issue involving improper termination because Jones was already properly suspended without pay prior to his purported termination.

CONCLUSION

This case does not present this Court with any issue worthy of further review. The lower court's decision did not rely on federal law, but instead simply applied state law. Moreover, the issues which the Petitioner seeks to

raise here were not properly before the lower courts. Accordingly, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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